No. 136.

Brf. of McLoud for Appellees.

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Supreme Court of the United States,

OCTOBER TERM, 1899.

W. H. ANSLEY, M. H. GLEASON, AND R. O. EDMONDS .....*Appellants,*

v. **No. 136.**

N. B. AINSWORTH, L. C. BURRIS, O. E. WOODS, JAMES ELLIOTT, AND THE OLA COAL AND MINING COMPANY .....*Appellees.*

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

Brief of Appellees.

J. W. McLOUD,
Counsel for Appellees.

ARKANSAS DEMOCRAT CO.

IN THE

Supreme Court of the United States,

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QUESTION OF JURISDICTION.

The appellees have entered a special appearance and filed a motion to question the jurisdiction of the court to proceed further in this case, and in support thereof submit the following:

The record discloses the fact that this case was brought directly from the trial court to this court, and it becomes pertinent, therefore, to inquire whether this court at this time has any jurisdiction to pass upon the issues here presented. The United States Court in Indian

Territory was created by act of Congress dated March 1, 1889 (25 Stat. at L., 783). May 2, 1890 (26 Stat. at L., 81), Congress passed an act "enlarging the jurisdiction of the United States Court in the Indian Territory, and for other purposes," and provided in the forty-second section thereof that appeals and writs of error might be taken and prosecuted from the decision of the United States Court in Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided.

This act was passed prior to the act creating the United States Circuit Courts of Appeals under the act of March 3, 1891 (26 Stat. at L., 826), which, by its fifth section, deprived that court of jurisdiction of cases of this character, and provided for appeals direct to the Supreme Court of the United States.

March 1, 1885 (28 Stat. at L., 693), Congress passed an act providing for the appointment of additional judges of the United States Court in Indian Territory, and in section 11 of said act constituted the judges of the United States Court in Indian Territory a court of appeals, and invested said court with such jurisdiction and powers in Indian Territory, and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof, by the laws of said State. It will be seen that by the terms of this act the Court of Appeals of Indian Territory was not in its appellate jurisdiction deprived of the consideration of cases of this character. By this act it was intended by Congress to create and establish in Indian Territory a judicial system similar, as far as possible, to the system existing in the State of Arkansas, and unless some express provision can be found in the acts of Congress authorizing and providing for appeals or writs of error directly from the trial courts in Indian Territory to the Supreme Court of the

United States, a review of the decisions of the trial courts must be first had in the court of appeals in Indian Territory before being taken to the Supreme Court of the United States.

This court has held in the case of *Brown v. U. S.*, 171 U. S., 631, 637, decision by Justice Shiras, that "the decisions of the court of appeals in the Indian Territory (under the act of 1895) are final except so far as they are made subject to review by some express provision of law. In the eleventh section of this act of March 1, 1895, it is provided that 'appeals and writs of error from the final decisions of said appellate court (in Indian Territory) shall be allowed, and may be taken to the circuit court of appeals for the Eighth Judicial Circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States;' but it is not claimed by counsel for plaintiff in error that this provision applies to capital cases." Neither can it be claimed that this provision of this act applies to cases involving the constitutionality of any law of the United States, or of the validity or construction of any treaty made under its authority, because in cases of this character, the United States circuit courts of appeals are deprived of jurisdiction in the same section (section 5) of the act of 1891, that deprives that court of jurisdiction of capital cases.

Under this view of the law, and under the authority of *Brown v. U. S.*, 171 U. S., 631, 637, the appeal in this case should have been taken to the court of appeals in Indian Territory.

Or, if we adopt the other theory, which is supported by the case of *Brown v. U. S.*, that the court of appeals in Indian Territory is analogous to the Supreme Court of the District of Columbia, and bears the same relation to the trial courts in Indian Territory as the Supreme Court of the District of Columbia bears to the trial court in the District of Columbia, it must also be held that the decision of

the court of appeals in Indian Territory, if the appeal had been taken there, would have been final.

Brown v. U. S., 171 U. S., 631, 637.

Ex parte Bigelow, 131 U. S., 328, 329.

In re Heath, 144 U. S., 42.

Cross v. Burke, 146 U. S., 82, 84.

The act of March 1, 1895, was intended to give the court of appeals in that Territory appellate jurisdiction of all cases from the trial courts in Indian Territory. Take, for instance, the question of capital cases: Prior to the act of 1895, the trial courts in Indian Territory did not have jurisdiction of such cases, but were given jurisdiction of them by that act, and this court held in the case of *Brown v. U. S.*, above cited, on pages 636, 637, that this gave the court of appeals in Indian Territory appellate jurisdiction over said cases. "Of course, as, when this act was passed (act of 1891), the United States court in Indian Territory had no jurisdiction over capital crimes, Congress did not contemplate any appeal or writ of error in such cases (in the act of 1891, creating the United States courts of appeals), and when by the act of March 1, 1895, jurisdiction of the United States court in Indian Territory was extended to capital cases, and the court of appeals was established with power to entertain appeals and writs of error, the act of March 3, 1891, cannot be regarded as applicable to such cases. Where a statute provides for a writ of error to a specified court of appeals, it must be regarded as the repeal of any previous statute which provides for a writ of error to another or different court."

Again, in the case of *Stephens v. Cherokee Nation*, 174 U. S., on page 481, the court said: "The act of March 1, 1895, provided for the appointment of additional judges of the United States court in Indian Territory, and created a court of appeals, with such superin-

tending control over the courts in the Indian Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof." Thus clearly intending, as above stated, to create and establish in Indian Territory an appellate court analogous, as far as possible, to the Supreme Court of Arkansas or to the supreme court of a State; and hence appeals from the trial courts, except in the two classes of cases provided for in the act of July 1, 1898, hereafter referred to, should be taken to the court of appeals in Indian Territory, and except in said two classes of cases no appeals can be taken to this court from the trial courts in Indian Territory.

In the Indian appropriation bill, approved July 1, 1898 (30 Stat. at L., p. 591), Congress provided that "appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, to either party, *in all citizenship cases, and in all cases between either of the five civilized tribes and the United States,* involving the constitutionality or validity of any legislation affecting *citizenship, or the allotment of lands,* in the Indian Territory, under the rules and regulations governing appeals to said court in other cases."

We understand this court to have decided, in the case of *Stephens v. Cherokee Nation,* 174 U. S., 445, that this provision of the act of 1898 authorized appeals direct from the trial court to the Supreme Court of the United States only in two classes of cases:

First. Citizenship cases.

Second. Cases between either of the five civilized tribes and the United States.

And that these two classes of cases can only be heard in the supreme court on the question of the constitutionality or validity of the legislation affecting *citizenship* or the *allotment of lands* in Indian Territory.

As the case at bar is not within the two classes of cases named in the act of 1898, as defined by this court in the case just referred to, we think it should be governed by the provisions of the act of March 1, 1895, creating the court of appeals in Indian Territory, and that the appeal should have first been taken to that court.

The act of 1895 certainly supersedes the provisions of section 5 of the act of 1891, creating the United States Court of Appeals, which provides that "appeals or writs of error may be taken from the district or circuit courts direct to the supreme court, * * * in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question," so far as appeals or writs of error from Indian Territory are concerned.

As this case does not come within the two classes of cases which the act of 1898, above referred to, provides shall be taken from the trial courts in Indian Territory direct to the Supreme Court of the United States, but is governed by the act of 1895, which in legal effect provided that the court of appeals established in Indian Territory should have appellate jurisdiction of all cases of which the trial courts in Indian Territory had jurisdiction, we do not think the court has jurisdiction in this case, for the reason that the appeal was taken from the trial court direct to this court, instead of to the court of appeals in Indian Territory.

STATEMENT OF FACTS.

The facts of this case upon which the issues are based are as follows:

It is claimed that on November 7, 1890, appellants, Gleason and Edmonds, non-citizens of the Choctaw nation, and one Lorin A. Riddle, a citizen by blood of the Choctaw nation, discovered coal, and

thereby acquired in a coal claim an exclusive and perpetual right to the same, to themselves and their assigns, under section 18 of article 17 of the Choctaw constitution, which reads as follows:

"Any citizen of this nation who may find any mine or mines or mineral water shall have the exclusive right and privilege *to work the same* so long as he may choose, within one mile in any direction from *his works or improvements*," etc.

That on February 28, 1898, the said Lorin A. Riddle conveyed his undivided one-third interest in said coal claim to appellant, W. H. Ansley, an Indian citizen by blood.

That appellants, Gleason, Edmonds and Ansley, made a lease of said coal mine to appellee, O. E. Woods, for the working of said coal mine, and that the said Woods in turn made a lease to the Ola Coal and Mining Company, a corporation, for the working of the same; that under said lease appellants Gleason, Edmonds and Ansley were to receive a royalty, as provided by the laws of the Choctaw Nation.

The act of Congress of June 28, 1898, known as the "Curtis law," which contained and ratified, as amended, an agreement with the Choctaw and Chickasaw nations, known as the "Atoka Agreement," which was afterwards ratified by the people of said nations on the 24th day of August, 1898, canceled and annulled all individual leases in the Choctaw Nation, and prohibited anyone from paying, and individuals from receiving, any royalty on coal, and provided that all of the royalty should be paid into the treasury of the United States for the benefit of the tribe, and drawn therefrom under such rules and regulations as should be prescribed by the secretary of the interior, and that all leases for the working of coal should be entered into between the persons or corporations desiring to mine coal and the mining trustees of the Choctaw and Chickasaw nations, such leases to be approved by the secretary of the interior.

This suit is brought to enjoin the appellees, O. E. Woods, James Elliott, and the Ola Coal and Mining Company, from entering into a lease with appellees, N. B. Ainsworth and L. C. Burris, mining trustees of the Choctaw and Chickasaw nations, and to test the provisions of said act of Congress and the Atoka agreement contained therein, which canceled and annulled individual leases and abolished individual royalties.

The principal provisions of the Atoka agreement, which abolished individual leases and individual royalties, is found in Vol. 30 U. S. Stat. at L., p. 510:

"It is agreed that all coal and asphalt within the limits of the Choctaw and Chickasaw nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes, so that each and every member shall have an equal and undivided interest in the same. * * * All agreements heretofore made by any person or corporation with any member or members of the Choctaw and Chickasaw nations, the object of which was to obtain such member or members' permission to operate coal or asphalt, are hereby declared void. * * * No royalties shall be paid except into the United States treasury, as herein provided."

BRIEF AS TO THE LAW ON THE MERITS OF THE CASE.

As this court has held, in the case of *Stephens v. Cherokee Nation,* that appeals from the trial courts in Indian Territory to the Supreme Court of the United States lie only in citizenship and allotment of land cases, and that these can be considered by the court only for the purpose of determining the constitutionality and validity of the legislation affecting them; and as the court has held in the same case that the act of Congress in question in this case is valid and con-

stitutional, it is probably unnecessary for us to do more than cite that case. But as the brief for the appellants goes into the merits of the case at length, we have thought best to meet all of the propositions advanced, so that if the court holds that it has jurisdiction, and that the merits of the case can be inquired into, it may be conclusively shown that the appellants have no case on the merits, or law.

In the discussion of the case on the merits, we deem it unnecessary to go into an extended statement of the history of the Choctaw and Chickasaw tribes of Indians. This history is doubtless familiar to every member of this court and every student of American institutions. It may be conceded that the attorneys for the appellants have stated fairly and fully the provisions of the Choctaw constitution, and the articles of treaties between the United States government and the Choctaw tribes of people which bear upon the subject-matter of this controversy.

The first proposition submitted by the appellants is that the right of coal discoverers in the Choctaw Nation under the Choctaw constitution, is a vested right when measured and tested by the constitution and laws of the United States. In order, therefore, to bring to the notice of the court the point of the first contention, we submit the following proposition:

I.

The right of coal discoverers and their assigns, under the provision of the Choctaw constitution, is not a vested right, and could be taken away, either by the Choctaw legislature or by the people of the Choctaw Nation, as was done in this particular case.

In order to arrive at a clear understanding of these matters it is necessary to discover first what power and authority the government

of the United States exercises, and has a right to exercise, over the Indian tribes known as the five civilized tribes, one of which is the Choctaw Nation. From the earliest decisions of this court down to the present time it has been uniformly held that these tribes are separate dependent sovereignties, subject to the control and power of the United States government. Indeed, it was said by Mr. Chief Justice Marshall, in *Cherokee Nation v. Georgia,* 5 Pet., 1, 17, that these Indian tribes "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and domain of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility." The learned chief justice who gave expression to this utterance understood the peculiar relations which these Indians bore to the United States government as few men understood them, and so far as we have been able to ascertain, the position which Chief Justice Marshal assigned to these tribes, politically and socially, in the above-mentioned case, has never been modified by subsequent decisions of this court.

We think the constitutionality and validity of the act of Congress in question is upheld and every question in this case decided against the contention of appellants by this court in the case of *Stephens v. Cherokee Nation,* 174 U. S., 445, from which we shall quote at length later on, but before doing so refer to the following decisions:

In the case of the *United States v. Kagama,* 118 U. S., 375, 379, this court, by Justice Miller, said:

"But these Indians (Cherokees) are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties,

and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their power to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified or repealed at any time by Congress. * * * This power of Congress to organize territorial governments and make laws for their inhabitants arises not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territories and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." Citing *Murphy v. Ramsay,* 114 U. S., 15, 44.

In the case of the *United States v. Rogers,* 4 How., 567, the relation of these tribes to the United States government was stated with brevity and with great clearness. The learned chief justice in that case said:

"It is true that it is occupied by the tribe of Cherokee Indians, but it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States and under their authority. * * * We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority."

This court, by Mr. Justice Harlan, in the case of *Cherokee Nation v. Kansas Railway Co.,* 135 U. S., 641, after citing the decision of Chief Justice Marshal, above quoted, and the decision in the case of the *United States v. Rogers,* and after quoting the above extract from the *Kagama* case, on page 655 quotes further from that case, as follows:

"They (meaning these Indian tribes) were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. * * * The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

In this *Cherokee Nation* case, Justice Harlan (on the same page) further says:

"The latest utterance upon this general subject is in *Choctaw Nation v. U. S.*, 119 U. S., 1-27, where the court, after stating that the United States is a sovereign nation, limited only by its own constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable, under the terms of the constitution, of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.' "

Justice Harlan, in the *Cherokee Nation* case, above cited, on page 654, says further:

"By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;' and, by the treaties of Washington, (1846 and 1866), the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over the country. (Revision of Indian Treaties, pp. 65. 79. 85.) But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits."

This court, in the *Choctaw Nation* case, 119 U. S., 27, quotes from the *Kagama* case as follows:

"These Indian tribes are the wards of the nation; they are communities *dependent* on the United States; *dependent* largely for their daily food; *dependent* for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessnesss, so largely due to the course of the dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive,

and by Congress, and by this court, whenever the question has arisen."

In the case of *Thebo v. The Choctaw Tribe of Indians,* 27 U. S. App., 661, in a decision by Judge Caldwell of the Eighth Circuit, it is stated:

"While the nation (meaning the Choctaw Nation) has many of the attributes of the political unit which constitutes the civil and self-governing community called the 'State' or 'nation,' it is not a sovereign State, but is a domestic and dependent State, subject to the jurisdiction and authority of the United States."

The general power of Congress over these Indian tribes is luminously stated and upheld by this court in the case of *Stephens v. Cherokee Nation,* 174 U. S., 445, in a decision by Chief Justice Fuller. This Cherokee Nation case involved the constitutionality of the Curtis Law under consideration in the case at bar, and practically all of the legislation of Congress affecting the Choctaw and Chickasaw tribes of Indians, and sustains the Atoka agreement contained in said Curtis Law. On pages 484, 485, 486, Chief Justice Fuller epitomizes the decisions of the supreme court heretofore quoted, and also all other decisions of the supreme court in relation to these Indian tribes, as follows:

"As to the general power of Congress we need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in *Cherokee Nation v. Southern Kansas Railway Company,* 135 U. S., 641, 653, from whose opinion we quote as follows:

" 'The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support

in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation v. Georgia,* 5 Pet., 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' It is true, as declared in *Worcester v. Georgia,* 6 Pet., 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583) that 'in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State, or separate community.' But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belong-

ing to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court rendered since the cases already cited. In *United States v. Rogers*, 4 How., 567, 572, the court, referring to the locality in which a particular crime had been committed, said: 'It is true that it is occupied by the tribe of Cherokee Indians, but it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. * * * We think it too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority.' In *United States v. Kagama*, 118 U. S., 375, 379, the court, after observing that the Indians were within the geographical limits of the United States, said: 'The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. * * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they

resided. * * * The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' The latest utterance upon this general subject is in *Choctaw Nation v. United States,* 199 U. S., 1, 27, where the court, after stating that the United States is a sovereign nation limited only by its own constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.' "

"Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plentitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the constitution."

In view of these decisions, we think it cannot be seriously questioned at this day that the power of the Federal government over these Indian tribes is plenary and that the Federal government, acting through its legislative authority, is the sole judge as to what is best

for the Indians and most conducive to their welfare. The word "pupilage" which has often been used by this court to express the relation which these Indians bear to the Federal government, was used advisedly and expresses, to our mind, that relation with more clearness and exactness than any other word could possibly do. It was never intended that these Indian tribes should erect governments which at any time should be superior to and independent of the power of the United States government. It is true that in the treaties referred to in appellants' brief, the United States did guarantee to these tribes, among which was the Choctaw Nation, the unrestricted right of self-government, and did thereby give to these tribes the authority to distribute the powers of government in any way they might see fit, provided such government erected by them and the distribution of its powers were not in conflict with our system of government. But nowhere, either in the treaties or in the adjudications of this court, can any expression be found which indicates that the United States government ever at any time intended to surrender its control over these tribes and its power to determine what was best for their present and future welfare. The adjudications of this court have been followed up and given support by the Congress of the United States, and the legislation of that body for fifty years has been uniformly directed to the control and supervision of these tribes. It is fruitless, therefore, to enter into a more extended discussion of the power of the Federal government over these Indian tribes. That power has been so often defined, both by the courts and by congressional legislation, that it may be said, as above stated, to be in every sense plenary.

Assuming, then, that the government of the United States still retains its control and supervision over these tribes, we are justified in further assuming that all treaties which have been made between

the United States government and these Indian tribes were made with a view to their protection both as against the encroachment of the white man and as against themselves. It is well known and a part of the public history of the country, that when the lands now occupied by these tribes were assigned to them by the United States, they were a semi-civilized people. They had followed the chase and the war path, and it was intended by the government, by means of subsequent treaties, to bring them to an appreciation of civilized government and to encourage in them a love of our institutions. These Indians, at the time the treaty of 1820 and the treaty of 1830 were entered into, had no knowledge of the value of real estate and did not know the good which flows from organized government. Their laws were made up of custom and tradition, and they were not, at the time these treaties were entered into, in a situation to manage their own affairs, including their landed interests, without the supervision of the Federal government.

Knowing their political and social conditions at the time the treaty of 1855 was entered into between the Choctaw people and the United States government, we must conclude that the language of that treaty was chosen with much care and was intended to express as exactly as language could express the tenure by which these Indians held their lands. The language of the treaty of 1855, article 1, is as follows:

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common so that each and every member of either tribe shall have an equal, undivided interest in the same; *provided,* however, no part thereof shall ever be sold without the consent of both tribes and that said lands

shall revert to the United States if said Indians and their heirs become extinct, or abandon the same."

The language of this treaty is, "to hold in common so that each and every member of either tribe shall have an equal, undivided interest in the same."

We think the language of this treaty clearly establishes a tenancy in common between the members of the Choctaw and Chickasaw tribes; and being tenants in common, each one is entitled to an equal, undivided share of all of the lands. Why was it that this language was used? Why was not the title fixed in the Choctaw and Chickasaw Nations as corporate or political entities or tribes, and not in the members of those nations? The answer seems to us to be obvious. When the United States government by treaty declared that these Indians should be tenants in common as to their lands, it meant that this landed estate should remain intact, incapable of partition or alienation until the United States government should give its consent. The guaranty of the United States government that each and every member of either the Choctaw or Chickasaw tribes shall have an equal, undivided interest in all the lands assigned to them, would be set aside and destroyed if the contention of appellants is correct, and would be subversive of the policy pursued by this government towards the Indians for more than half a century. It is true that the constitution of the Choctaw Nation, section 18, article 7, provides as follows: "Any citizen of this nation who may find any mine or mines or mineral waters, shall have exclusive right and privilege to work the same, so long as he may choose, within one mile in any direction from his works or improvements; *provided,* however, he does not interfere with the rights of a former settler;" but if this constitutional provision is to be construed as giving to each Choctaw citizen who discovers a mine upon the lands of his

tribe the exclusive right to occupy an area of land two miles in diameter perpetually through himself and his descendants, it must amount in law to an appropriation and acquisition by that citizen of that much land. This result would be just what the treaty was intended to avoid.

The right to work the coal granted the discoverer of coal and the right to lease the same, if he had such right, could only continue during the existence of the tenancy in common; and whenever the tenancy in common should be dissolved by the action of the tribe, or its people, or by act of Congress, these rights and privileges immediately ceased. Under the most liberal view of this provision of the Choctaw constitution, it is bound to be true that the discoverer of coal and his lessees or grantees, necessarily took the same subject to the implied limitation and condition that their rights were to continue only during the existence of the tenancy in common.

And even under this view, it cannot be held that these individual leases should continue until partition and allotment actually takes place, because the Indians themselves, in the agreement entered into by their representatives, known as the "Atoka agreement," which is embodied in the Curtis bill, and which by the Curtis bill was ratified by Congress and subsequently ratified by the Choctaw people, canceled these individual leases instanter.

Article 2 of the treaty of September 27, 1830, provides that:

"The United States, under a grant especially to be made by the president of the United States, shall cause to be conveyed to the Choctaw Nation, a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it."

7 Stat. at L., 333.

On March 23, 1842, in pursuance of this treaty, a patent was

executed by the United States to the Choctaw tribe of Indians, the granting clause of which is as follows:

"Know ye, that the United States of America, in consideration of the premises, and in execution of the agreement and stipulations of the aforesaid treaty (1830), have given and granted, and by these presents do give and grant unto the said Choctaw Nation, the aforesaid tract of country west of the Mississippi River, to have and to hold the same, with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, as intended to be conveyed by the aforesaid article, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, *liable to no transfer or alienation except to the United States, or with their consent.*"

If the right granted to the discoverer of coal by the Choctaw constitution is one in perpetuity, and such discoverer has the power to transfer this right in perpetuity to another in the form of a lease, as is claimed in this case, it is in fact an alienation of the property and is in violation of this provision of the patent between the United States and the tribe. The individual leases in controversy in this case are not merely grants of possession but are grants of the property itself. Under all the authorities, the coal in the ground is part of the real estate—is real property. These leases are therefore an alienation of the property and in violation of the provisions of the patent. These leases do not merely grant the use of the property, but they grant the property itself—the coal, which is by the lessee taken and removed.

We think, therefore, that it is fair to assume that the provision of the Choctaw constitution above mentioned was not intended to confer a property right as against all the other members of the Choctaw tribe, but was intended simply to confer upon the citizen

such use as would not be inconsistent with or destructive of the title guaranteed in section 18, article 17, of the treaty of 1855, and the patent of 1842. In other words, it must have been intended by the Choctaw people, when they adopted this constitutional provision, that it should not be in conflict with any treaty or law of the United States, and we must construe this constitutional provision in connection with the treaty and patent. If the members of the Choctaw tribe are tenants in common, and these tenants in common agree that some member of their tribe shall occupy a certain portion of the land for the purpose of developing the same and yielding a revenue which would go to all the members of the tribe, certainly the tenant in common so occupying such land could not resist a partition by setting up that his use was a perpetual use and that as to the land occupied by him he was practically its owner. The true theory is that these coal lands lying within the limits of the Choctaw Nation were valuable sources of revenue to the tribe, and the Choctaw people intended to encourage the citizens to discover these mines, and to that end gave them the use and enjoyment of the same; but in view of the treaties above mentioned, and in view of the language of the Choctaw constitution above set out, we cannot believe that this use and enjoyment was intended to be perpetual and thereby to work an ouster of the other members and a destruction of their interests in the land so used and enjoyed. If we are correct in this, then it is a mere waste of words to argue that appellees had no vested right in these mines.

The phrase "vested right" has been the subject of much discussion; but nowhere, either in the Federal constitution or in the adjudications of this court, is there any attempt to define exactly what this phrase means. This much seems to be settled, as was decided in the case of *State v. Newark,* 3 Duch., 197, "Courts do not regard

rights as vested contrary to the equity and justice of the case;" or, as was said in the case of *Foster v. Essex Bank,* 16 Mass., 245, "A party cannot have a vested right to do wrong."

Tested by these rules, can it be said that it would be right and just for members of the Choctaw tribe, who have discovered mines and worked them under the permission given by the Choctaw constitution, to hold these mines and the lands covered by them perpetually as against all of the other members of the Choctaw tribe? If this were true, then the lands of the Choctaw people would be owned by a few members, because, as a matter of public history, it is well known that a large proportion of the lands of the Choctaw people are coal lands and they are by far their most valuable lands, and if coal discoverers having the capital and energy to occupy these mines and work them should be permitted to own them by virtue of the constitutional provision above quoted, the result would be disastrous to the other members of the tribe whose interest the treaty of 1855 was clearly intended to protect. This construction would work a great wrong to the Choctaw people as a whole, and we do not believe that any vested right could possibly result from the perpetration of such wrong.

For the reasons above given, the right claimed by appellants, never was and never could become a vested right, for the reason that the discoverer of coal, and his lessee or grantee, were necessarily subject to the implied and inherent right and power of the Choctaw Nation and its people to take the same away at any time. It cannot be that one of the tenants in common, and his grantees (non-citizens of the Choctaw Nation, as are all of the appellants except Ansley) could acquire a vested right that could exist after the nation itself ceased to exist and after the tenacy in common had been dissolved by the action of the nation and the people themselves. It cannot

be that any right exists under this constitutional provision that is greater than the nation itself and beyond the power of the nation and its people, or the power of Congress, and the power of the Choctaw Nation, its people, and Congress combined, to repeal and take away. The individual Indian taking a right under this constitutional provision, and being himself a tenant in common with all the other Indians of his tribe, necessarily took the same subject to the controlling power of the other tenants in common.

We submit further that, owing to the peculiar relations existing between these Indian tribes and the government of the United States, as hereinbefore fully set forth, and as expressed in treaties, acts of Congress and decisions of the courts; and the fact that these Indians are the wards of the government; and in view of the superintending control and guardianship which the government has always exercised over them, an individual Indian could not acquire a vested right, which was beyond the power of Congress to change, alter, amend, or take away.

Leaving the question, therefore, of *vested right,* we come to the second proposition which we beg to submit.

II.

The provision of the Choctaw Constitution above quoted, does not give to the discoverer an irrevocable license.

Waiving the question at this time whether the Choctaw Nation would have the power to grant an irrevocable license, we confidently assert that the words of the constitutional provision and the situation of the parties do not justify the conclusion that the license to the discoverer was irrevocable. The rule is that a contract, even though

reduced to writing, giving the right to mine ore, does not convey the title to the land. It is a mere license. See *Silsby v. Trotter*, 29 N. J. E., 228; *Shepherd v. McCalmont Oil Co.*, 38 Hun., 37. The Choctaw Nation granted a privilege to one of its members. It could not compel that member to work the mine he discovered for a year, for a day, not even for an hour. The discoverer had a right, under the law, to abandon his mine at any time he saw fit. It would be therefore a curious doctrine that one person could be held to a contract as irrevocable, and the other retain power of revocation at any moment he might desire to exercise it. It is elementary that agreements in general must be mutual and obligatory on both parties. Tested by this rule, we conclude that inasmuch as the discoverer had a right to quit when he saw fit, the Choctaw Nation had a right to revoke his license when it should determine to do so. The trial judge whose opinion is copied in the transcript in this cause (pp. 38 to 52) considered this constitutional provision as a contract between the Choctaw Nation and the discoverers, and argued that, inasmuch as there was a want of mutuality between the parties, the contract was void, or, if not void, certainly revocable.

It seems to us that the trial judge might have added that if this constitutional provision is to be construed as a contract between the Choctaw Nation and one of its members, there is no inhibition in the Federal constitution against the impairment of that contract by the Federal Congress. As was said in the case of *Evans-Snyder-Buell Co. v. McFadden*, decided recently by the Eighth Circuit Court of Appeals, and not yet printed, however much the question might have been mooted, it is now settled that the inhibition in the Federal constitution against the impairment of contracts is a limitation upon the powers of the State government, and not upon the powers of the Federal government. So that when the United States

government declared, as it did in the act of June 28, 1898, that all coal lands of the Choctaw and Chickasaw tribes should be segregated from the balance of the domain and held in trust by the United States government as a source of perpetual revenue for all the members of those tribes, it enacted a law which it had the constitutional power to enact and which by reason of its sovereignty and supervision over these Indians no person has a legal right to question. It follows, then:

First. That the right claimed by the appellants is not a vested right, because it would work great wrong and injury to the Choctaw people, and because the Choctaw tribe of Indians, being tenants in common, and each individual member of the tribe being entitled to an equal and undivided share of all of the property of the tribe, and because of the superintending power and control over the Indians by Congress, an individual Indian could not acquire a vested right as against the other tenants in common, nor as against the tribe itself, nor as against the government of the United States.

Second. That this right granted by the Choctaw constitution was a revocable one, and has been revoked, as we shall show hereafter, in an appropriate and legal manner. And,

Third. That if this provision operates as a contract between the Choctaw Nation and the discoverer, its obligations can be impaired and its legal effect set aside by an act of Congress.

The learned judge who decided the case below contended that if the constitutional provision above set forth is to be given the force and effect claimed for it by appellants, it would be in conflict with the laws of the United States and the treaties made with the Choctaw Nation. The argument of the trial judge upon that question is so lucid that we will quote at length from the same, commencing at the bottom of page 47:

"Article 1 of the treaty of 1855, after defining the boundaries of the Choctaw and Chickasaw nations, provides as follows:

" 'And pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common, so that each and every member of either tribe shall have an equal undivided interest in the whole. *Provided,* however, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same.'

"Article II of the treaty of 1866 in part provides:

" '*Whereas,* the land occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and said nations of June 22, 1855, is now held by the members of said nation in common,' etc. Whether the treaty of 1855 be taken as an interpretation of the terms of the grant made by the parties to it or as the engrafting of a new condition in it is immaterial, because, in any view of the case, after the execution of the treaty its terms would be binding. Therefore the United States had been treating with the Choctaws alone in relation to their lands. Now a new party in interest appears. The Chickasaws, with the consent of the United States, had bought an interest in them, and it became necessary to define the rights and title of all.

"I think there can be no doubt but that these Indians hold their lands as tenants in common, at least since the treaty of 1855; but by that treaty the United States is made to guarantee to each Indian an enjoyment of an equal undivided share of these lands, and the Choctaws agree with the Chickasaws that it shall be done.

"The constitution, containing the provision by virtue of which

the plaintiff claims title, was not adopted until 1860, five years after the treaty of 1855 was ratified, and neither the United States nor the Chickasaw Nation were parties to it.

"The United States had the right, by virtue of its superior sovereignty over these Indian tribes and its guardianship over their wards, which has always been recognized, to make such an agreement with them and enforce it.

"If the eighteenth section of article 7 of the Choctaw constitution was intended to vest an indefeasible title to the coal mines in the discoverer, it would be in violation of two of the provisions of the treaty of 1855. First, it would be an appropriation and a sale of the realty without the consent of the Chickasaws; and, second, it would be in violation of that clause of the treaty which provides that the lands shall be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole.

"There is no limitation in the constitution as to the number of mines which a discoverer may own and appropriate to himself. The language is, 'Any citizen of this nation who may find any mine or mines,' etc., clearly giving to him the use of all he may discover. The records of the clerk's office of this court disclose that three of the most influential members of the Choctaw Nation, all high officers of the government, on one day executed to a St. Louis coal company twenty-eight leases of coal claims, each of the twenty-eight embracing a circular area of land the diameter of which was two miles, about 2,000 acres each, and this probably did not include one-half of their claims. If one man should acquire them all his title to the whole would be as perfect as if he had discovered but one. Diamond drills have been run into nearly all of the coal lands of this nation, and wherever the drill would discover coal in paying quantities, the holes

have been named in their paper claims and leases as monuments marking the center of each two-mile claim. Of course, this is going out of the record, for these facts are not in proof, but I merely mention them to show what the contention of the plaintiff leads to and how gravely this interpretation of the Choctaw constitution would be at variance with article I of the treaty of 1855, and the treaty between the United States and the Choctaws and Chickasaws having been adopted prior to the Choctaw constitution, if they conflict, the terms of the treaty must prevail; and if it be true that it was intended by this article of the constitution to convey an indefeasible title to the discoverer, so that he may hold the realty for all time against the will of the other tenants in common and of the Chickasaw Nation and the United States, there is a conflict between it and the treaty.

"I therefore hold that if the language of the constitution is to be construed as granting to the discoverer of mines in the Choctaw Nation an indefeasible title or right to the mine discovered by him as to the underlying coal, it is void as being in conflict with the treaty of 1855" (Tr., pp. 47, 48, 49).

It is further claimed by appellants in proposition three of their brief, that if the right granted by the Choctaw constitution to the discoverer is revocable at all, the right could only be revoked by amendment to the Choctaw constitution. It might be said, with some show of reason, that, in organized communities where personal and property rights are regulated by constitutions and laws, a majority of the community could not force a minority to surrender the rights of government and, incidentally, the rights of property. It is undoubtedly true that under our theory of government property rights are not determined by majority votes of the people, but are determined by the adjudications of courts organized for that pur-

pose; but while the general principles announced by appellants in their brief as to the exercise of these powers by the people, and the manner in which they shall be exercised, may be correct insofar as property rights are affected, they can have no application to a case like the one at bar. If it be conceded that the right granted by the Choctaw constitution was revocable in any manner, then it seems that a majority of the people who established the constitution giving the right could adopt any method it saw fit for taking it away, especially if the method was approved by the United States Congress.

III.

The court cannot inquire into the motives of Congress in Passing the Curtis Law, nor of the Indians in ratifying it—These are legislative and not judicial questions.

The appellants further complain that the Atoka agreement, which was adopted by a majority of the people of the Choctaw Nation and the Congress of the United States, was not a fair thing, because it was attended with circumstances of duress and coercion against the Choctaw people. When the Atoka agreement, which was made by and between representatives of the United States and the Indian tribes through agents lawfully appointed for that purpose, was presented for adoption, the United States government had reached the conclusion that the time was at hand for a partition of the lands held by the members of the tribes in common and for a settlement once for all of the vexatious questions which continually arose in the Indian country. This agreement was submitted fairly and openly, after full notice to the people of the Choctaw and Chickasaw nations, and they by a large majority adopted it, thereby giving

their consent in the best and most satisfactory way known to the people. It is beyond the power of this court to question the good faith of Congress, and it is never to be presumed that an act of a legislature is not *bona fide*. As was said by Chief Justice Fuller, in the case of *U. S. v. Old Settlers*, 148 U. S., 466, in reviewing the case of *U. S. v. Arredonda*:

"It will be perceived that this decision is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution. * * * * Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision."

In the case of *Whitney v. Robertson*, 124 U. S., 190, 194, Justice Field states with approval the effect of the decision of *Taylor v. Morton*, 2 Curtis, 454, 459, as follows:

"Whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he (Curtis) justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly imma-

terial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad. In these views we fully concur."

Mr. Chief Justice Chase, in the case *ex parte McCardle*, 7 Wall., 514, uses the following language:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the constitution, and the power to make exceptions to the jurisdiction of this court is given by express words."

So, also, Chief Justice Marshall, in the case of *Fletcher v. Peck*, 6 Cranch, 332, in discussing this subject, says:

"It may well be doubted how far the validity of a law depends upon the motives of its framers and how far the particular inducements operating on the members of the supreme sovereign power of a State to the formation of a contract by that power are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court in consequence of the means which procured it, still there would be much difficulty in saying to what extent those means must be applied to produce this effect. * * * If a majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned."

To say that a court, except in extraordinary cases, has the power to question the good faith of the action of the legislative department of the government would be subversive of our theory of government. We conclude, therefore, that any effort to attack the validity of this agreement on the ground of duress or coercion, which is not manifest

on the face of the laws themselves, but which rests only in the tender and enlightened conscience of appellants' counsel, is nothing less than an absurdity.

"The treaties referred to in the argument were all made and ratified prior to March 3, 1871 (the date of the act in question in that case); but it is 'well said that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the civil and judicial cognizance, and must be met by the political department of the government.' *Thomas v. Gay*, 169 U. S., 264, 271, and cases cited."

Stephens v. Cherokee Nation, 174 U. S., 445, 483, 484.

IV.

The act of Congress of June 28, 1898, and the Atoka agreement contained therein, were properly enacted, and are valid and constitutional laws, according to their terms.

The act of Congress and the agreement or treaty with the Choctaw tribe of Indians, the validity of which is in controversy in this action, is an act entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes" (30 Stat. at L., p. 495), known as the "Curtis Law," that part of which, after the first paragraph of section 29, on page 505, to the bottom of page 513, comprises what is known as the "Atoka agreement," being the agreement that was entered into by representatives of the United States and representatives of the Choctaw and Chickasaw tribes, on the 23d day of April, 1897, as amended by Congress in this act of June 28, 1898. The balance of the act relates to the agreement with the Creek Nation, and has no bearing upon this case. Section 29 (30 Stat. at L., p. 505) provides:

"That the agreement made by the commission to the five civilized tribes with commissions representing the Choctaw and Chickasaw tribes of Indians, on the 23d day of April, 1897, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the 1st day of December, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next general election, or at any special election, to be called by such executives for the purpose of voting on said agreement; and at the election held for such purpose all male members of each of said tribes qualified to vote under his tribal laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not; *provided,* that no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court, shall be permitted to vote at said election; *provided, further,* that the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretary of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and a national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the commission to the Five Civilized Tribes, to be designated by the chairman of said commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; *and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agree-*

ment; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this act."

It is contended by appellants in their fifth proposition that the Atoka agreement and the act of Congress of June 28, 1898, are both void by reason of the fact that the act of June 28, 1898, was passed by Congress prior to the adoption of the Atoka agreement, and the alternative was submitted to the Choctaw people of adopting the Atoka agreement which, if adopted, should supersede the act of Congress, and, if not adopted, the act of Congress should remain in force.

It is claimed that this was a delegation of legislative authority by the Congress of the United States in violation of sections 1 and 7, of article 1, of the constitution of the United States. Here, again, the appellants invoke a correct general principle, but one which is not applicable to the facts of this case. When the act of June 28, 1898, was passed by the Congress of the United States it carried with it also the Atoka agreement which was in advance ratified by Congress. Congress then said, in effect, to the Choctaw people, "Here we have passed a law known as the 'Curtis Act,' which provides a comprehensive scheme for the settlement of your difficulties. We prefer, however, that you adopt an agreement which has been negotiated between the representatives of the United States government and the representatives of your people. This agreement, known as the 'Atoka agreement,' if adopted by a majority of your people, shall become the act of Congress applicable to you. If you refuse to adopt the Atoka agreement—and you are to act freely and without compulsion in this matter—the Curtis bill is still effective."

The case of *Stephens v. Cherokee Nation,* 174 U. S., 445, is an exhaustive consideration of the constitutionality and validity of the Curtis Law and the Atoka agreement, as well as of all other legisla-

tion and treaties affecting the Five Civilized Tribes; but we quote only that part of the opinion relating to the act of Congress under consideration in this case. In the statement of the case, Chief Justice Fuller, on page 466, says:

"Section 29 (of the Curtis Law) ratified the agreement made by the commission with the commissions representing the Choctaw and Chickasaw tribes, April 23, 1897, as amended by the act, and provided for its going into effect if ratified before December 1, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose."

In the opinion of the court, Chief Justice Fuller, on page 491, says:

"The act (the Curtis Law) provided further for the resubmission of the two agreements with certain specified modifications, that with the Choctaws and Chickasaws, and that with the Creeks, for ratification to a popular vote in the respective nations, and that if ratified, the provisions of these agreements so far as differing from the act should supersede it. The Choctaw and Chickasaw agreement was accordingly so submitted for ratification August 24, 1898, and was ratified by a large majority, but whether or not the agreement with the Creeks was ratified does not appear. * * *

"The agreement with the Choctaw and Chickasaw tribes contained a provision continuing the tribal government, as modified, for the period of eight years from March 4, 1898; but provided that it should 'not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes.'

"For reasons already given *we regard this act in general as not obnoxious to constitutional objection.* * * *

"The elaborate opinions of the United States court in the Indian

Territory by Springer, J., Clayton, J., and Townsend, J., contained in these records, some of which are to found in the report of the Commissioner of Indian Affairs for 1898, page 479, consider the subject in all its aspects, and sets forth the various treaties, tribal constitutions and laws, and the action of the many tribal courts, commissions and councils which assumed to deal with it, but we have not been called on to go into these matters, as our conclusion is that we are confined to the question of constitutionality merely.

"As we hold the entire legislation constitutional, the result is that all the *judgments must be affirmed.*"

It is clear that Congress had the power to abrogate all treaties made with these Indian tribes and to pass the Atoka agreement and make it a law without the consent of the Indian tribes. It has been repeatedly held by this court, that an act of Congress may supersede a treaty, and a treaty may supersede an act of Congress, as was held in this court in the *Cherokee Tobacco case,* 11 Wall., 616-621:

"The effect of treaties and acts of Congress, when in conflict, is not settled by the constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty (citing authorities). In the case referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere

of judicial cognizance. In the case under consideration, the act of Congress must prevail as if the treaty were not an element to be considered."

This view was also clearly stated by Justice Field in the case of *Whitney v. Robertson,* 124 U. S., 190, 195.

"It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations in a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases,* 112 U. S., 580, it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations, but the court replied that so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country, and after a full and elaborate consideration of the subject, it held that 'so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal.' "

But Congress did not desire, evidently, to adopt such harsh measures, so it gave to the Indians an opportunity of making an agreement with the United States government which should be satisfactory to the Indians, and in preparation of which the Indians should take a conspicuous part. If Congress had the power originally to pass the Atoka agreement without the consent of the Choctaw and Chickasaw people, it certainly had the power to make it a law when these people by a majority vote consented to the same, and it cannot therefore be said that Congress delegated its legislative authority to the Choctaw and Chickasaw people when it in effect said to such

people, "We have a law here known as the 'Curtis Law,' which will become effective or not upon the happening of a future event, viz: the adoption or non-adoption by you of what is known as the 'Atoka agreement.' " The law books are practically unanimous in declaring that conditional legislation based upon the happening of a future event is not unconstitutional. Mr. Sutherland, in his work on *Constitutional Construction,* uses this language:

"If an act is adopted by the legislature as a law, and, pursuant to its provision, it is submitted to the people and on their expression of approval or disapproval as a fact or event the act by its terms does or does not take effect, the only question is whether the legislature can pass a law to take effect on such a contingency. The authorities would seem now to have established the doctrine, though not universally, that the result of a popular vote is a contingency on which laws may be enacted to take effect."

Mr. Cooley, in his work on *Constitutional Limitation*, 6th Ed., p. 137, says: "A statute may be conditional, and its taking effect may be made to depend upon some subsequent event." This expression is founded on the case of *Brig Aurora v. U. S.,* 7 Cranch, 382.

The appellants' counsel confuses the passage of the law with its operation. The Atoka agreement was complete when it passed; only the operation was contingent. The remarks of Coulter, J., in *Com. v. Painter,* 10 Pa. St., 214, 216, are peculiarly applicable to this case and are in part as follows:

"A strong illustration of the faculty of the legislative power in this respect may be found in the act of Congress of the 9th of July, 1846, submitting the question of the retrocession of the county of Alexandria, in the District of Columbia, to the State of Virginia, to a vote of the qualified electors of that county. Virginia had previously enacted a law signifying her willingness to take back the

county, whenever the same should be receded by the Congress of the United States. Congress enacted the law of the 9th of July, 1846, submitting the question to the qualified electors and providing the machinery for the election, and enacting that, if a majority of the electors shall be against accepting the provisions of the act, it shall be void and of no effect; but if a majority of votes shall be in favor of accepting, then it shall be in full force. And in that event, it shall be the duty of the president to inform the governor of Virginia of the result of the election, and that the law is consequently in force. Many of the most profound constitutional lawyers in the Union were in Congress at that time, and the State of Virginia never hesitated to accept the retrocession, because the Congress of the United States delegated to the people the decision of the question."

In the case of *Bank of Rome v. Village of Rome,* 18 N. Y., 38, it is held that an act of the legislature which, by its terms, is to take effect immediately, but which confers on certain municipal officers certain powers not to be exercised until the inhabitants of the municipality have approved the act by vote, is constitutional, and is not a delegation of legislative power. See, also,

People v. Salomon, 51 Ill., 37, 52, 53, 54, 55.

Clark v. Rogers, 81 Ky., 43.

State v. Parker, 26 Vt., 357.

State v. O'Neal, 24 Wis., 149.

In the Wisconsin case it was contended further that as the law was not to go into effect unless ratified by the people, it was not in force for the purpose of authorizing an election, and was not in force for any purpose when the election was held. The act fixed the time for holding the election, and provided that the vote should be returned and canvassed, etc., and that "if a majority of the votes cast at such election upon such question shall be in favor of a board of

public works, the mayor shall make proclamation of the fact, and thereupon this act shall take effect and be in force from and after the 1st day of May, 1869," being the same in meaning as the provisions on this subject in the Curtis Law and Atoka agreement under consideration in this case.

The case last cited decided clearly that while the legislature cannot delegate power to enact laws, it may provide that whether or not a law enacted shall be operative may be made to depend upon the popular will.

The case of *People v. McFadden*, decided by the Supreme Court of California, and reported in 81 Cal., 489, 22 Pac. Rep., 851, presents a clear discussion of the question under consideration. There the act provided that if less than two-thirds of the qualified electors voted in favor of the creation of the new county, the act should cease to be of any force or effect. The act itself was passed and approved and became a perfect law, and the repeal of the law was to take place if less than two-thirds of the electors voted in favor of the creation of the new county. The act known as the "Curtis Law" became a law, perfect and complete, but this law was not to be effective as against the Choctaws and Chickasaws if they adopted the Atoka agreement within the prescribed time. It seems therefore that the California case and the case at bar are practically parellel. The court in the California case above cited, page 53, says:

"But it further claimed that if the act does not delegate to the people the power to create the law, it does delegate to them the power to repeal it by reason of the sentence, 'if at such election less than two-thirds of the qualified electors voting for and against the creation of the proposed county, vote for the creation of said county, then this act shall cease to be of any force and effect,' and that by reason thereof the whole act is void. If the effect of this sentence

was as claimed, to delegate to the people the power to repeal the act, a complete and perfect answer to the objection would be that the sentence might be stricken out entirely without affecting any other portion of the act. This being so, the presence of this sentence would not render the whole act void. But we do not think that such was the force or effect of this clause. The law was complete and in force the moment it was approved by the governor. It provided for the different steps and stages of proceedings in carrying it into effect. One of its provisions was that when it had reached a certain stage in these proceedings, which stage must be reached within a time limited by the legislature, further proceedings under it should depend upon the happening of an event which might or might not happen, to-wit: the favorable vote of the electors. If that event or contingency happened, then all the remaining provisions of the act were to be carried into effect, and this, too, was to be done within the time limited by the act. If the event did not happen, then by its own terms no further provisions of the act were to be carried into effect. Not only had the legislature the power to provide upon what condition or contingency the provisions of the act might be carried into effect, but also to provide within what time it must be done, if done at all, and it may have been a wise provision, in view of the rapid changes taking place in the conditions of the surrounding country and the numbers of its people, to say that, 'If you do not choose to accept the permission granted by the provisions of this act within the time herein named, it shall not remain an open permit to be accepted at any future time.' * * * Whatever may have been the reason which moved the legislature thereto, it did not delegate to the people the power to repeal the act, but itself said that if the provisions of the act were not accepted within the period named, they should not thereafter be carried into effect.

"The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law—an event on which the expediency of the law in the opinion of the lawmakers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declares the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves and then perform the duties which a constitution imposes upon them."

Cooley Const. Lim., 144.

We, therefore, respectfully urge that there is no merit in the contention of appellants, and submit that this case should be affirmed.

We call the attention of the court to the opinion of the learned trial judge, which can be found in full in the transcript herewith filed, and which is a careful and exhaustive discussion of all the points raised by the appellants in their brief.

Respectfully submitted,

J. W. McLOUD,

Counsel for Appellees.